SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. ——.

EX PARTE L. J. BRYAN, AS MARSHAL, FOR THE USE OF CREDITORS, *Petitioner.*

PETITION FOR WRIT OF CERTIORARI, REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVIEW AND DETERMINATION THE CASE OF LOUIS BERNHEIMER, APPELLANT, VS. L. J. BRYAN, AS MARSHAL, ETC., RESPONDENT, No. 797.

To the Honorable the Chief Justice and the Associate Justices of Said Court:

The petition of L. J. Bryan as marshal respectfully shows:

1. That your petitioner is a citizen of Alabama and is Marshal for the United States District Court for the Middle District of Alabama.

2. That on the 29th day of October, 1898, one D. Abraham, residing in the city of Montgomery and State of Alabama, and being engaged in the crockery business, made a general assignment of his stock of goods to one H. C. Davidson, for the benefit of his creditors. That at the time of making said deed of assignment the said Abra-

ham was largely indebted for merchandise bought by him and for other things.

3. That thereafter, on the 7th day of November, 1898, A. C. Barler Manufacturing Company, an Illinois corporation and a creditor of said D. Abraham, did, together with certain other creditors of the said Abraham in number and with debts in the amount required by law, file a petition in involuntary bankruptcy against the said Abraham in the District Court of the United States for the Middle District of Alabama, sitting in bankruptcy, under and in accordance with the provisions of an act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1, 1898, alleging the execution of said deed of general assignment as an act of bankruptcy and petitioning said District Court to adjudicate the said D. Abraham a bankrupt and to administer his estate in the manner prescribed by law under said act of Congress. That a copy of said petition and a summons was forthwith served on said Abraham.

4. That thereafter, on the seventeenth day of November, 1898, the said H. C. Davidson, assignee, did transfer and deliver said stock of goods, which was worth in value $10,000 and upward, to one Louis Bernheimer, a citizen of the city of Montgomery and State of Alabama, at private sale, the said Louis Bernheimer claiming to have bought the same for himself and to have paid the said Davidson the sum of $3500 therefor.

5. That at the time of the said transfer from the said Davidson to the said Bernheimer, both the said Davidson and the said Bernheimer had actual knowledge of the former filing of the petition in involuntary bankruptcy against the said D. Abraham, and of the proceedings thereupon pending. That said Bernheimer immedately took possession of said stock of goods and began to dispose of same as a "Bankrupt Sale."

6. That the said D. Abraham was, on the twelfth day of December, 1898, duly adjudged a bankrupt under those proceedings formerly filed against him under the act of Congress aforesaid.

That thereafter, and on the same day, said petitioning creditors filed a petition in said District Court (see Record, p. 4) alleging the facts aforesaid and the interference of said Louis Bernheimer with the jurisdiction of said District Court, that he was dissipating said property and praying that this petitioner, as marshal, as provided for in said act as aforesaid, be required to take said property into his possession and to hold the same until the further orders of said court. That an order was issued to petitioner as prayed for by said creditors and petitioner took charge of what remained of said property. That on the following day a notice was issued by said District Court *ex mero motu* to the said Louis Bernheimer, to come into court within ten days and propound his claim, if any he had, to said goods.

7. That said petitioning creditors, A. C. Barler Manufacturing Company *et al.*, on the seventeenth day of December, 1898, filed another petition in said District Court, asking that the said Louis Bernheimer be required to account to said Court for the moneys received by him from the sales of said goods while the stock was in his possession, and an order was issued by said District Court as prayed for (see Record, p. 8).

8. That thereafter, on December 22, 1898, the said Louis Bernheimer came into said District Court and filed his claim to said goods, and on December 24, 1898, he filed an answer to the notice to account, showing what he claimed to have been his sales during the time the property was in his possession, praying that his claim and his answer be considered together, submitting his claim to the Court in that behalf, alleging that he had a good title,

and asking the said District Court to adjudicate his rights (see Record, p. 14).

9. That the said A. C. Barler Manufacturing Company *et al.*, petitioning creditors, filed in said Court eight demurrers to said claim and answer (see Record, p. 12). That the said District Court sustained said demurrers, and the said Bernheimer declining to plead further, the said District Court did, on the twenty-fourth day of December, 1898, enter up a judgment sustaining said demurrers and ordering a reference to determine the amount of sales made by Bernheimer (see Record, p. 16). That said Louis Bernheimer thereupon executed a bond in the sum of $8000, and prayed for an appeal and supersedeas to the Circuit Court of Appeals for the Fifth Circuit, which was granted (see Record, p. 17). That said Bernheimer filed said bond in said District Court, and said property was by your petitioner released and returned to the said Bernheimer forthwith, and has been in his possession ever since.

10. That on his said appeal the said Bernheimer alleged as error the sustaining of the demurrers and the rendition of the judgment as the same was rendered (see Record, p. 19). That in said Circuit Court of Appeals, your petitioner, for the use of creditors, being made respondent, filed a motion to dismiss said appeal, alleging five separate grounds therefor (see Record, p. 22).

11. That in said Circuit Court of Appeals said case was docketed as follows: "*In re* D. Abraham, Bankrupt; Louis Bernheimer, Appellant, vs. L. J. Bryan, Marshal for the use of Creditors, Appellee;" and was entered as No. 797. That said case was argued and submitted in said Circuit Court of Appeals on February 9, 1899.

12. That on, to-wit: April 25, 1899, the said Circuit Court of Appeals rendered an opinion and judgment in favor of said Bernheimer and against your petitioner, as follows:

"Did the District Court as a court of bankruptcy have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizure of the goods, and a rule to account entered against the adverse claimant? It seems clear to us that under the act of 1867 the District Court, as courts of bankruptcy, are not invested with jurisdiction to proceed in that way in such cases as this, and that the whole tenor of the present law forbids the assumption and exercise of such jurisdiction." (See Record, p. —.) "Therefore, judging, as we do, that their (the creditors') application and the issuance of the writ thereon was wholly unwarranted, the seizure and holding of the goods unlawful, and that the possession thereof must be restored to the adverse claimant, it is our opinion that he (Bernheimer) should be allowed all costs, counsel fees and damages occasioned by such seizure, taking and detention of the property so adversely claimed and held by him; the counsel fees, costs, expenses and damages to be fixed and allowed by the court of bankruptcy and to be paid by the petitioning creditors; to secure the payment whereof Bernheimer should be allowed a lien upon whatever distributive share they may be entitled to receive out of the bankrupt's estate. It is ordered and decreed that the order, judgment and decree appealed from, rendered on December 24, 1898, be and the same is hereby reversed, and the cause is remanded to the District Court sitting in bankruptcy, with instructions to dismiss the petition of the creditors of D. Abraham, bankrupt, filed against the appellant, Louis Bernheimer, on the seventeenth day of December, 1898, to vacate all orders made thereon, and to restore to the said Louis Bernheimer the goods taken from his possession, and thereafter proceed in accordance with the views expressed in this opinion and as equity may require."

The opinion was rendered by McCormick and concurred in by Pardee, circuit judge. Judge Parlange

filed a dissenting opinion to that part awarding costs, damages, etc., against the petitioning creditors. A certified copy of the entire record of said case in the Circuit Court of Appeals is hereto annexed as part of this application, in conformity with rule 37 of this Honorable Court.

13. That the Circuit Court of Appeals decided that the District Court had no jurisdiction to try and determine Bernheimer's title, and nevertheless directs the said District Court to award Bernheimer damages for the taking and detention of the property; that the District Court can not undertake to award Bernheimer damages for the detention and taking of the property until it first determines whether Bernheimer has a good title to the property. If he had no title he was not injured; that the Circuit Court of Appeals thus in effect decided that the District Court did and did not have jurisdiction to determine the title to the property.

14. That the Circuit Court of Appeals for the eighth circuit in the case of *Davis vs. Bohle et al.*, in Bankruptcy, decided (Federal Reporter, Vol. 92, Advance Sheets No. 2, p. 325) that a deed of general assignment is avoided by an adjudication in bankruptcy of the assignor when a petition is filed against him alleging the execution of such an instrument, and that the District Court in which the petition was filed may, under the provisions of the act, order the marshal of that Court to take possession of the property assigned and hold the same until a trustee is appointed. That the Circuit Court of Appeals for the second circuit in the case of *In re* Gutwillig, Fed. Rep., Vol. 92, Advance Sheets No. 2, p. 337, decided that the deed of assignment is void as against proceedings in bankauptcy instituted within four months. That the decision of the Circuit Court of Appeals for the fifth circuit in this case is in conflict with said decisions in the Circuit Courts of Appeal for the second and eighth circuits and also in conflict with the express provisions of the bankrupt act of

1898 directing District Courts to appoint receivers or marshal to take charge of the property of bankrupts where they should find it necessary.

15. That it is essential for a uniform construction and administration of the bankrupt act throughout the United States that this Honorable Court construe such parts of the bankrupt act of 1898 as relate to this case, reconcile or set at rest the conflicting opinions in regard to the same and decide the rights of your petitioner and the creditors of D. Abraham.

16. Your petitioner respectfully represents to this Honorable Court that no appeal is allowed him to this Court under the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States" approved July 1, 1898, and that his only remedy is by petition for a writ of certiorari under Sec. 25, subdivision *d* of said act.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said circuit court of appeals in the said case entitled "*In re* D. Abraham, Bankrupt. Louis Bernheimer, Appellant, vs. L. J. Bryan, Marshal, for the Use of Creditors, Appellee, No. 797" to the end that the said cause may be reviewed and determined by this court as provided in section 6 of the act of Congress entitled "An Act to establish Circuit Courts of Appeal, and to define and to regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, and as provided under Section 25, subdivision *d*, of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, or that your

petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with said acts and that the said judgment of the circuit court of appeals in said case, and every part thereof, may be reversed by this Honorable Court..

Wherefore your petitioner will ever pray, etc.

L. J. BRYAN, *Marshal*,
by G. F. MERTINS,
Attorney and Counselor for Petitioner.

J. D. ROUSE,
WM. GRANT,
Of Counsel for Petitioner.

STATE OF ALABAMA, }
COUNTY OF MONTGOMERY. }

G. F. Mertins, being duly sworn, says that he is one of the attorneys and of counsel for L. J. Bryan, marshal, the petitioner above named, and as such had personal charge for him of the case in the foregoing petition mentioned in the District Court of the United States for the Middle District of Alabama and in the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the said petition by him subscribed, and that the facts therein stated are true, to the best of his information and belief.

(Signed) G. F. MERTINS,

Subscribed and sworn to before me this the twelfth day of May, A. D. 1899.

(Signed) LEON WEIL,
Notary Public, Montgomery Co., Ala.

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

The act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1, 1898, Chapter 3, Section 3, provides that, "Acts of bankruptcy by a person shall consist of his having (Subdivision 4) made a general assignment for the benefit of his creditors."

Such an instrument when made within four months prior to the filing of a petition in bankruptcy against the party making it, is a fraud upon the act and is made with intent to "hinder delay and defraud his creditors," since its necessary effect is to defeat the operation of the act and the rights of creditors to such an administration of the assets as that act provides, and is therefore void, as against his subsequently appointed trustee in bankruptcy and the petitioning creditors.

In re Gutwillig, C. C. A., Second Circuit, Fed. Rep., Vol. 92, Advance Sheets No. 2, p. 337.

Davis vs. Bohle et al., C. C. A., Eighth Circuit, Fed. Rep., Vol. 92, Advance sheets No. 2, p. 325.

The bankrupt act of 1898 is the only act which has ever provided in terms that the making of a general assignment should be an act of bankruptcy for the making of which the assignor might be adjudged a bankrupt, but the courts, under the act of 1841 and the act of 1867 decided generally that such a conveyance was voidable because the effect of it was to defeat the operation of the act.

Globe Insurance Company vs. Cleveland Insurance Company, 14 B. R. Register, 311.

After the property had been taken from Bernheimer by your petitioner upon the petition of the creditors and the order of the Court thereon, the Court *ex mero motu* issued an order to Bernheimer to come within ten days and propound any claim that he might have to the goods. Bern-

heimer filed his claim or petition and his answer setting up his claim of title, and without filing a plea to the jurisdiction of the Court, "submitted his claim to the Court in that behalf." The petitioning creditors demurred to his claim and answer. The validity *vel non* of the deed of general assignment from Abraham to Davidson, and the transfer to Bernheimer from Davidson, in the case at bar, as against the petitioning creditors, was, under the demurrers, the only question before the District Court. No question of jurisdiction was raised. The Circuit Court of Appeals, having considered the appeal of Bernheimer, to which he had no shadow of right under the act, as a petition for a writ of certiorari, failed and refused to decide this question. although it was before it.

The petitioning creditors in this case, within eight days of the filing of the deed of general assignment, viz., on November 7, 1898, filed their petition alleging the execution of the instrument and asking that the assignor be adjudged a bankrupt and his property be administered by the bankrupt court. The two cases above cited, *In re* Gutwillig and Davis vs Bohle *et al.*, and a long list of decisions of the District Courts all over the country, hold that such an instrument, as against the petitioning creditors, is void. They could not hold otherwise, for there can be no controversy as to the meaning of Sec. 3, subdivision, of the act. The purpose of the act would be defeated entirely.

The bankrupt court has under Sec. 2, subdivision 7 of the act, original jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto, except as herein otherwise provided."

It would be a strange spectacle that of a bankrupt court adjudging a man a bankrupt for the execution of a deed of general assignment and then being forced to sit idle while the assignee administers the estate, dissipates it and

squanders it, with no checks on him whatever, and then finally to grant that bankrupt a discharge. Abraham's general assignment was void as to the creditors in bankruptcy, and the District Court alone had the right to administer the estate.

The second proposition is whether the District Court had the power to dispossess Bernheimer of the property in the manner in which it was done.

The act of 1898 provides, Sec. 2, subdivision 3, that the courts of bankruptcy shall have original jurisdiction to "appoint receivers or the marshals, upon application of parties in interest, in case the Court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified."

This general provision is qualified by another provision following later, Sec. 3, subdivision *e*, as follows: "Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt and an application is made to take charge of and hold the property of the alledged bankrupt, or any part of the same *prior to the adjudication and pending a hearing upon the petition*, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or judge thereof in such sum as the court shall direct," etc.

The first provision allows this to be done at any time after the filing of the petition, but the second provision qualifies it by providing that if it is done before the adjudication, there must be a bond.

Must the property necessarily be in the hands of the bankrupt? The act does not so provide. It simply says the "property of the bankrupt." The two cases, *In re* Gutwillig and Davis vs. Bohle et al., above cited, hold that it may be taken away from the assignee of a bankrupt un-

der these provisions when the bankrupt has made a general assignment.

In the case of Sharpe vs. Doyle, 102 U. S. 686, cited also and approved in the case of Feibelman vs. Packard, 109 U. S. 421, the defendant in error cited the cases of Smith vs. Mason, 14 Wall. 419, and Marshall vs. Knox, 16 Wall. 551. Bernheimer on his appeal cited the cases of Smith vs. Mason and Marshall vs. Knox and relied on them to show that the property could not be taken from him summarily.

We will say in the beginning that Smith vs. Mason and Marshall vs. Knox differ materially from the case at bar in that in those cases the property had been transferred long before proceedings in bankruptcy were instituted, while here the property was in the hands of Davidson, Abraham's agent, when the proceedings were instituted and Bernheimer was simply meddling and interfering with the jurisdiction of the District Court.

Mr. Justice Miller, in Sharpe vs. Doyle, in delivering the opinion of the court, said: "The act of Congress was designed to secure the possession of the property of the bankrupt, so that it might be administered under the proceedings in the bankrupt court. Between the first steps initiating proceedings in the bankrupt court and the appointment of the assignee (trustee), a considerable time often passes. During that time, the property of the bankrupt, especially in a case commenced by creditors, may be surreptitously conveyed beyond the reach of the court of the assignee (trustee), to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceeding, he can, with the aid of friends or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods, or remove them beyond the reach of the assignee (trustee) or the process of the court, and defy the law. The evidence in this case shows the man-

ner in which this can be done. It was the purpose of the act of Congress to prevent this evil. It therefore provides that as soon as the petition in bankruptcy is filed, the court may issue to the marshal a provisional warrant directing him to take possession of the property and effects of the bankrupt and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt, would have manifestly defeated in many instances the purposes of the writ. There is therefore no such limitation expressed or implied. As in the writ of attachment or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant wherever found; so here it is made his duty to take into his possession the property of the bankrupt wherever he may find it. It is made his duty to collect and hold possession until the assignee (trustee) is appointed or the property is released by some order of the court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee (trustee) when appointed, as a sufficient reason for failing to take possession of it."

The petition and order in this case in the District Court sitting in bankruptcy, and of which Bernheimer complains, was a proceeding for a vindication of the control of Abraham's property by the Court.

Bernheimer took possession of the property after the petition in bankruptcy had been filed and, as he states in his answer, with actual knowledge of the former filing of the petition and of the proceedings thereupon pending and after consulting with counsel "learned in the law, and who were perfectly conversant with all the facts in the case."

Even if he purchased for himself and with his own money, there was no *bona fides* in that transaction. He

stands in just the same position as Davidson would have stood had the petition been directed against him.

In the case of Bank vs. Sherman, 101 U. S. 403, Mr. Justice Swayne, for the Court, said: "The filing of the petition was a caveat to all the world. It was in effect an attachment and an injunction. Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. If that were in his favor, they revived and were in full force. If it were against him, they were extinguished as to him and vested in the assignee (trustee) for the purposes of the trust with which he was charged. The bankrupt became, as it were, *civilitur mortuus*. Those who dealt with his property in the interval between the filing of the petition and the final adjudication did so at their peril. They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction. With the intermediate steps they had nothing to do. The time of the filing of the petition and the final result alone concerned them. In this case the title of the assignee (trustee) is in all respects just what it would have been if the bankrupt had done nothing, and there had been no interposition by the appellants. Otherwise, the efficacy of the act depended not upon its own language and meaning, but was only what others outside of the proceeding might permit it to be. This would be a solecism and largely defeat the purpose of the statute and the policy of Congress in enacting it."

The bankruptcy act of 1898, provides, that the bankrupt court shall have original jurisdiction, Sec. 2, subdivision 7, to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto except as herein otherwise provided," and under subdivision 15, same section, to "make such orders, issue such process and enter such judgments in addition to those specifically provided

for as may be necessary for the enforcement of the provisions of this act" and under subdivision 6 "bring in and substitute additional parties or persons in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy," and lastly "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Section 23, subdivision (b) provides that "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

But it seems clear to us that the suits referred to in this section and article were based on causes of action vested in the bankrupt prior to the surrender, which were transmitted to the estate by the assignment. As to these it may be conceded that the trustee must resort to the court which would have had jurisdiction of the action it brought by the bankrupt. The action, however, to recover assets unlawfully concealed or assigned, is not denied from the bankrupt, but invested in the creditors through their trustee, by statute, and jurisdiction to enforce it is necessiarly invested in the court which is charged with the administration of the estate.

Bernheimer contends, and the Circuit Court of Appeals upholds him in his contention, that the petitioning creditors should have waited until a trustee should be elected, and then have that trustee go into the State Court and bring a formal suit against him for the property because of Sec. 23 of the act.

When the creditors filed their petition asking that this petitioner be required to take the property into his possession, Abraham had just been adjudicated a bankrupt, and there was no one to bring a formal suit. Under Sec. 23

rights or action accrued to the bankrupt from property passed to the trustee, as to which he becomes a new party, but in the same forum; and mere rights of action might accrue to the trustee from his course of administration to which that provision might and should properly apply. But the assets of the bankrupt are brought by the proceedings within the reach and control and subject to the orders of the Court, and no one has a right to remove or meddle with them but for their preservation without leave of the Court except the trustee.

The Circuit Court of Appeals argues that summary proceedings are not looked upon with favor by this Honorable Court. The contention is doubtless a proper one, but it surely can not apply where a person meddles with the administration of the estate in the bankrupt Court while that Court is proceeding with the administration in the manner laid down by congress. The very act itself, Sec. 29, subdivision (b), No. 4, makes it a crime for any person to receive "any material amount of property from a bankrupt after the filing of the petition, with the intent to defeat this act." Davidson, the assignee, was simply Abraham's agent; he had no more title to the property than Abraham had.

The right is given the bankrupt Court through its marshal to take charge of the property, and besides, to make such orders and issue such process as may be necessary for the preservation of the property, and when Bernheimer, during the proceedings, with actual knowledge, attempts and does actually snatch the estate away in spite of and in defiance of the bankrupt Court, whether for himself or others, surely he can not be heard to say or to complain that the manner of wresting it from him, though in accordance with the law, does not suit his personal convenience. It is to be supposed that he would have preferred that the District Court should wait until the trustee should be elected snd then let the trustee bring a

formal suit in the State Court, which might not come up for months afterward, when he could mock the attempts of the trustee to prove the articles composing and the value of a stock of goods which had been scattered to the four winds, and which he had never seen.

The decisions in *In re* Gutwillig and in Davis vs. Bohle and in Sharpe vs. Doyle, above cited, are in accordance with the letter and the spirit of the law. The reasoning is sound and any other construction of the law would make the courts utterly impotent to carry out the provisions of the bankrupt law.

The Circuit Court of Appeals in this case says that the District Court had no jurisdiction whatever to try and determiue Bernheimer's title to the property. We contend that under the Sec. 2 above cited, it had full power to do so and that original jurisdiction was given it. It then orders the District Court to fix and allow to Bernheimer "all costs, counsel fees and damages occasioned by such seizure, taking and detention of the property so adversely claimed and held by him (Bernheimer), they to be "paid by the petitioning creditors."

How can the District Court fix and allow such damages for the taking and detention of this property until it first determines whether Bernheimer had a good title to the property? If he had no right to the property, he was not damaged by the taking and detention and the petitioning creditors would have a right to require Bernheimer to prove in the District Court first of all things, that the property belongs to him. The Circuit Court of Appeals says that the District Court can not do this and yet it proceeds to direct it to do so.

The right of the petitioning creditors to require this proof has been fully decided in this Court in the cases of Sharpe vs. Doyle, 102 U. S. 686, and in Feibelman vs. Packard, 109 U. S. 421, both cited above. Surely, surely this can not stand.

This Honorable Court has said that a court which has no jurisdiction of a case can not even award costs or order execution for them to issue.

Mayor vs. Cooper, 6 Wall. 247.

Smith vs. Whitney, 116 U. S. 175.

Elk vs. Wilkins, 112 U. S. 98.

Judge Parlange, in his opinion dissenting from that portion of the opinion of the Circuit Court of Appeals, which awards these costs, damages, etc., cited these cases.

Granted, for the sake of argument, that the District Court did not have the power to try Bernheimer's title on the notice issued to him *ex mero motu* by the Court to come in and propound his title, why should the Circuit Court of Appeals dismiss the petition of the creditors and the order thereon which was in nowise connected with that notice when the power and right to ask for that order is given them by the act and the power to issue the order is given to the Court?

We earnestly and respectfully contend that the action of the District Court, sitting in bankruptcy, was in all things proper, and respectfully pray that the judgment of the Circuit Court of Appeals in this case, and every part thereof, may be reversed by this Honorable Court.

Respectfully submitted,

J. D. ROUSE,

WILLIAM GRANT,

Of Counsel for Petitioner.